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No. 80-1874

IN THE

SUPREME COURT

OF THE

UNITED STATES

GEORGIA PATSY,

Petitioner,

v.

BOARD OF REGENTS OF THE STATE OF FLORIDA, a Body Corporate, For and On Behalf of, FLORIDA INTERNATIONAL UNIVERSITY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE STATES OF WASHINGTON, ALABAMA, ALASKA, ARIZONA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TEXAS, UTAH, VERMONT, WEST VIRGINIA, WISCONSIN, WYOMING, AND TERRITORY OF AMERICAN SAMOA

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QUESTION PRESENTED

Is a flexible exhaustion of administrative remedies rule with respect to actions brought under 42 U.S.C. § 1983 appropriate in light of considerations of comity, federalism and sound judicial administration, and consistent with Congressional policy?

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STATEMENT OF INTEREST OF AMICI

Recognizing their responsibility to guard, enforce and protect every right guaranteed by the Constitution, most states have developed detailed and effective administrative procedures to ensure that none of the

myriad decisions taken daily by state officials and agencies will act to deprive citizens of those rights. Some state remedies, admittedly, may be inadequate for this purpose, and responsible state officials would be among the first to concede that such remedies need not be exhausted. At issue here, however, is a rule allowing the total circumvention of the most adequate and effective state remedies in all situations where a deprivation of rights cognizable under 42 U.S.C. § 1983 is merely alleged.

The development of fair and effective administrative remedies is an on-going process demanding a substantial commitment of state resources. More importantly, the development of such remedies is a sign of the health and vitality of a dual system of government, for if the states aggressively protect federal rights, core federal interests will be vindicated without any unnecessary federal intrusion.

Conversely, these interests — of the national government as well as of the states — would be subject to forfeit if the wholesale, indiscriminate circumvention of adequate state administrative remedies sought by petitioner is allowed.

SUMMARY OF ARGUMENT

This Court has not yet decided whether adequate state *administrative* remedies must be exhausted before bringing an action under 42 U.S.C. § 1983. A flexible exhaustion requirement of the type adopted by the Fifth Circuit, below, would help preserve a vital role for the states in a dual system of government, without compromising the protection of federal rights. Such an appropriate flexible exhaustion requirement would be consistent with the purposes of § 1983 and recent decisions of this Court. An uncompromising no-exhaustion rule, on the other hand, would needlessly upset federal equilibrium; it would also be inconsistent with the purposes of § 1983 and would draw the federal courts into deciding suits not ripe for adjudication, thereby intruding into state decisions not yet final, and in some cases not yet even rendered.

ARGUMENT

I. A Flexible Requirement That Adequate Administrative Remedies Be Exhausted Serves the Interests of Federalism Without Compromising The Protection of Federal Rights.

Of all the good ideas lying at the core of our form of government, the notion of federalism, a "sensitivity to the legitimate interests of both State and National Governments," *Younger v. Harris*, 401 U.S. 37, 44, 45 (1971), occupies a position of preeminence. Like many such concepts, however, federalism may come into conflict with other equally good ideas when placed in the crucible of the real world. For instance, the responsibility of the federal courts to act as the ultimate guarantor of federally-protected rights, *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) may, when state action is responsible for a deprivation of those rights, require a penetrating federal intrusion. Even so, this Court has determined that the protection and vindication of federal rights must be accomplished "in ways that will not unduly interfere with the legitimate activities of the State * * *" *Younger, supra*, at 44.

The tension and the challenge inherent here has perhaps nowhere been as evident as in the judicial development of 42 U.S.C. § 1983.[1] Although the very adoption of the statute was the product of a "vast transformation" in the concepts of federalism, see *Mitchum, supra* at 242, it was narrowly construed and infrequently litigated for several decades after its passage. *Note, Limiting Section 1983*, 82 Harv. L. Rev. 1486, 1487 (1969). More recently, however, quite likely in response to the increased

[1] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *"

commitment to the protection of individual federal rights which has characterized the second half of this century, § 1983 has gained increased vitality, see *id.* at 1486-87, until today it is something very close to a general damage remedy available to anyone who alleges that a state or local official has withheld, intentionally or negligently, some federal benefit in violation of any federal statute. *Maine v. Thiboutot*, 448 U.S. 1, (1980); *Cf., Parratt v. Taylor*, ___ U.S. ___, 68 L.Ed.2d 420, 427-428 (1981).

A pendulum with this sort of momentum behind it may easily swing too far. This Court, recognizing the potentially dire impacts the post-*Thiboutot* remedy could visit upon already strained governmental entities (see, *City of Newport v. Fact Concerts, Inc.*, ___ U.S. ___, 69 L.Ed.2d 616, 634 (1981)), has, in a number of very recent cases, indulged in some necessary fine tuning of § 1983. In *City of Newport*, at 635, for example, municipalities were held to be immune from awards of punitive damages under § 1983. Significantly, the Court accompanied its discussion of the effects such an award would have on municipalities with a demonstration that the denial of punitive damages would have little, if any, deleterious effect on the protection of federal rights. *Id.*, at 634. This approach represents a classic use of one of the prime injunctions of federalism, the charge that federal rights are to be protected "in ways that will not unduly interfere with the legitimate activities of the States * * *" (Quoting *Younger, supra* at 44). Other recent examples of tailoring § 1983 by carefully limiting its scope are *Middlesex County Sewerage Authority v. National Sea Clammers*, ___ U.S. ___, 69 L.Ed.2d 435 (1981) and *Pennhurst State School and Hospital v. Halderman*, ___ U.S. ___, 67 L.Ed.2d 694 (1981).

With the instant case, the Court is presented with another opportunity carefully to fine-tune § 1983 in a fashion which will avoid some potentially extreme federal intrusions into legitimate state provinces, without compromising in the least the vindication of federally-protected rights.

The petitioner would have the Court hold that under no circumstances is a § 1983 plaintiff required to exhaust even readily available, adequate and appropriate state administrative remedies. The violence which such a rule would do to settled notions of federal-state comity is both immediate and severe. It would allow and even encourage the circumvention of considered state administrative procedures designed to reach a just settlement of the dispute. It would ignore this Court's pronouncement that state forums have the solemn responsibility, equally with the federal courts, "to guard, enforce and protect every right granted or secured by the constitution. * * *" See, *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974). It would ignore this Court's recent recognition that "consideration of federal-state comity" may militate strongly against weakening an exhaustion requirement, even where there has been a "clear violation" of a federal right. *Duckworth v. Serrano*, ___ U.S. ___, 50 U.S.L.W. 3297 (10/19/81). It would remove from the states an incentive to provide full and fair administrative remedies, *Cf.*, Discussion of 42 U.S.C. 1997, *infra* at page 12. And, it would deny the states opportunities to apply the often expensive and hard-won expertise of its administrative agencies in the resolution of disputes.

Perhaps the plainest statement, though, of the important role an exhaustion requirement can play in our federal system was that made in *Preiser v. Rodriguez*, 411 U.S. 475, 491 (1973), as follows:

> "The rule of exhaustion in federal habeas corpus actions is rooted in consideration of federal-state comity. That principle * * * has as much relevance in areas of particular state administrative concern as it does when state judicial action is being attacked * * * [Considerations of comity] are not limited to challenges to the validity of state court convictions * * *"

These considerations obtain with equal force in § 1983 actions.

In pronounced contrast to the mischief a no-exhaustion rule could inflict a requirement that a § 1983

plaintiff first exhaust adequate administrative remedies would not impair the right to vindicate federal rights in a federal forum. In the first place, immediate federal adjudication is not necessary to provide immediate protection for federal rights. Comment, *Exhaustion in Section 1983 Cases*, 41 U. Chi. L. Rev. 537, 548 (1974). This is especially true where, as here, interim relief is not even practical — for a court most certainly would not have ordered the petitioner temporarily employed in the positions she sought pending the outcome of the litigation. In addition, a litigant's right to a full and complete proceeding in a federal forum would not be affected by a flexible exhaustion requirement, since state administrative determinations have no *res judicata* or collateral estoppel effect over a federal court. *Id.* at 551.

II. This Court Has Not Squarely Decided That Exhaustion of Administrative Remedies May Never Be a Prerequisite To a § 1983 Action.

The Petitioner's argument that exhaustion of administrative remedies is never required in § 1983 cases leans heavily upon a series of decisions by this Court beginning with *Monroe v. Pape*, 365 U.S. 167 (1961). Although some of these decisions do contain *apparently* categorical dicta that exhaustion of administrative remedies is not required under § 1983, a more exacting analysis shows that, if anything, these decisions actually support the flexible exhaustion requirement adopted below by the Fifth Circuit.

The cornerstone of the later decisions, the authority upon which they will build, is the statement in *Monroe*, *supra* at 183, that "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is involved." See, for example, *McNeese v. Board of Education*, 373 U.S. 668, 671, 672 (1963); *Damico v. California*, 389 U.S. 416, 417 (1967); and *Houghton v. Shafer*, 392 U.S. 639, 640 (1968). The initial problem with using this language from *Monroe* as the

source of a rule that exhaustion of administrative remedies is not necessary is that *Monroe*, quite simply, did not deal with *administrative* remedies. Rather, the case dealt with state *judicial* remedies. Note, 51 Miss.L.J. 283, 288 (1980); and Comment, 41 U. Chi. L. Rev., *supra* at 542. Other than simply citing *Monroe* (or citing other cases citing *Monroe*), *McNeese* and its progeny do not give full analysis to their dicta that the exhaustion of administrative remedies is not a prerequisite to § 1983 claims. See, 82 Harv. L. Rev., *supra* at 1491. Key decisions in the *McNeese* line were made through short, per curiam opinions without the benefit of briefing or oral argument. See, *Damico, supra* at 420 (Harlan, J., dissenting) and *Wilwording v. Swenson*, 404 U.S. 249, 252-53 (1971) (Burger, J., dissenting). Yet petitioner would extract from such a basis a rule that exhaustion of *administrative* remedies, no matter how adequate or appropriate those remedies might be, is never necessary. In so doing, Petitioner would ascribe to the court an analysis which, amici states submit, it has never engaged in.

An even more fundamental flaw in basing a no-exhaustion rule on the statements in *Monroe* relied upon by *McNeese* and its offspring is that those statements were made in response to a question wholly apart from that of exhaustion. One of the central issues in *Monroe* was whether actions of governmental officials which were an abuse of their authority nevertheless could be said to be taken under color of state law. See, *Monroe, supra* at 172.

The Court paraphrased the argument that such acts were not under color of state law in the following manner:

> "In this case it is said that these policemen, in breaking into petitioner's apartment, violated the constitution and laws of Illinois. It is pointed out that under Illinois law a simple remedy is offered for that violation and that, so far as it appears, the courts of Illinois are available to give petitioner that full redress * * *" (*Id.* at 172)

This statement strongly suggests that the issue of adequate state remedies did not arise in *Monroe*, as part of

an argument that the case should be dismissed because the plaintiffs did not avail themselves of those remedies; but rather, as an essential part of the state's position that since the defendants' acts were punishable by state law, those acts could not be under color of state law. See, 82 Harv. L. Rev., *supra* at 1489. Furthermore, the statement in *Monroe* that the federal remedy is supplementary to the state remedy comes immediately after a long discussion of the legislative history of § 1983, *as it relates to the color of law issue, Id.* at 183, and immediately before a discussion of the implications of *U.S. v. Classic*, 313 U.S. 299 (1941) and *Screws v. United States*, 325 U.S. 91 (1945) on that same issue. *Monroe, supra* at 183-187. The statements in *Monroe* relied upon by the *McNeese* line of cases, lying at the foundation of the various dicta relied upon by Petitioner, are thus most appropriately read as meaning simply that in determining whether or not the defendant acted under color of state law it is irrelevant whether state law provides a remedy for the defendant's actions. These statements, when read, as they must be, in the context of the issues to which they were directed, provide no support for the notion that *Monroe* upset the then well-established rule that exhaustion of *administrative* remedies is required in § 1983 cases. See, *e.g., Lane v. Wilson*, 307 U.S. 268, 274 (1939); and 41 U. Chi. L. Rev., *supra* at 542.

Each case in the *McNeese* line containing dicta that exhaustion of administrative remedies is not required rest, ultimately, on this language from *Monroe*. See, *McNeese, supra* at 672; *Damico, supra* at 417; *Houghton, supra* at 640; *King v. Smith*, 392 U.S. 309, 312, n. 4 (1968); *Wilwording, supra* at 251; *Preiser, supra* at 477; *Carter v. Stanton*, 405 U.S. 669, 671 (1972); *Allee v. Medrano*, 416 U.S. 802, 814 (1974); and *Ellis v. Dyson*, 421 U.S. 426, 432-33 (1975). Each of these cases, furthermore, involved either a situation where traditional exhaustion doctrine would not have required recourse to state administrative remedies, or a situation where judicial, not administrative, remedies were involved. See Note, Developments—Section 1983, 90 Harv. L. Rev., *supra* at 1133, n. 1 (1977); and Comment, 41 U. Chi. L. Rev., *supra* at 543.

For instance, *McNeese* concerned an administrative remedy so inadequate that the Court stated: "When federal rights are subject to such tenuous protection, prior resort to a state proceeding is not necessary." *McNeese, supra* at 676. Accord, *Damico, supra* at 418 and 419 (Harlan, J., dissenting). *Damico, Houghton* and *Carter*, on the other hand, involved situations where recourse to the available administrative remedies would likely have been futile. See, *Damico, supra* at 416, *Houghton, supra* at 640 and *Carter, supra* at 671. The administrative remedy available in *King* was both inadequate, *Patsy v. Florida International University*, 634 F.2d 900, 907 (5th Cir., 1981) and futile. In *Ellis* the only state remedy available to the § 1983 plaintiffs was a judicial one (see *Ellis, supra* at 419), while in *Allee, supra*, no suggestion was made that any administrative remedies even existed. At any rate, the extent of the official intimidation and misconduct present in *Allee* (see, *supra* at 805-809), insured that the resort by the plaintiff farm workers to any administrative remedy would be a futile act indeed. Finally, the no-exhaustion statements in *Preiser* and *Wilwording* were dicta of the most extreme type since, most certainly in *Preiser, supra* at 500, and most likely in *Wilwording*, see *Preiser, supra* at 503 (Brennan, J., dissenting), the claims at issue could not have been raised under § 1983 in the first place.[2]

These cases form the foundation of petitioner's claim that she was not required to exhaust administrative remedies. Each of these cases relies, in the last analysis, on language in *Monroe v. Pape, supra*, which is not even addressed to the issue of exhaustion. Each of these cases presents a factual situation where employment of

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[2]Petitioner's reliance on the no-exhaustion dictum in *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974), is even more misplaced. That case dealt with the effect of threatened, criminal proceedings *against* the § 1983 plaintiff, *Id.* at 454, and not, as does the doctrine of exhaustion, with the effect of civil, administrative proceedings available *to* the § 1983 plaintiff. At any rate, the spectre of Scylla and Charybdis which animated the *Steffel* Court's reasoning, *Id.* at 462, does not obtain when adequate administrative remedies are available.

traditional exhaustion doctrine would have resulted in plaintiffs not being required to exhaust.

Indeed, some of these cases even contain language suggesting quite plainly that it is the traditional, flexible exhaustion doctrine which is to be applied in § 1983 cases. For example, in *Carter*, the Court carefully couched its no-exhaustion holding in these words.

> "Damico, an indistinguishable case, likewise establishes that exhaustion is not required *in circumstances such as those presented here.*" *Carter, supra* at 671 (emphasis supplied).

In *McNeese*, the Court summarized its conclusion by stating that:

> "* * * [w]hen federal rights are subject to such tenuous protection, prior resort to a state proceeding is not necessary." *McNeese, supra* at 676.

Damico stressed that to require exhaustion of administrative remedies *in that situation* "would be to demand a futile act." *Damico, supra* at 640.

These cases thus actually lend support to our submission that the flexible exhaustion approach adopted by the Fifth Circuit below is to be used in § 1983 cases. They do not establish that exhaustion is never required in § 1983 cases.

III. The Requirement That Adequate Administrative Remedies Be Exhausted Is Consistent With The Purposes Of § 1983 And Recent Decisions Of This Court.

The pressing reasons of policy for adopting a flexible exhaustion requirement in § 1983 cases are well summarized below, *Patsy, supra* at 910-912, and at 90 Harv. L. Rev., *supra* at 1256-60, 1272 and need not be repeated here. We here propose, moreover, that a flexible exhaustion requirement is also consistent with the *purposes* of § 1983 as well.

In *Monroe*, the Court summarized Congress' intent as: (1) to override certain kinds of state law, (2) to provide

a remedy when the state remedy is inadequate and (3) to provide a remedy where the state remedy, although adequate in theory, is not available in practice. *Monroe, supra* at 173-74. If, aside from cases of actually overriding state law, the purpose of § 1983 is to provide a federal remedy where state remedies are inadequate in theory or practice, it follows that it was the intent of Congress that § 1983 be invoked only *where and when* such state remedies indeed are inadequate. See, 41 U. Chi. L. Rev., *supra* at 553. To apply petitioner's uncompromising no-exhaustion rule would be to ignore this Congressional intent, for if adequate administrative remedies may be bypassed, the federal courts will find themselves in the business of granting first relief under § 1983 when equivalent relief could have been obtained through state processes.[3] Accord, 82 Harv. L. Rev., *supra* at 1490.

Congressional debate on § 1983 "provides only weak support for [§ 1983 as] a supplementary federal remedy * * *" 82 Harv. L. Rev., *supra* at 1492. On the other hand, the evils against which § 1983 was directed "substantiate the three main aims listed in *Monroe* without suggesting that a need was felt for a fully supplementary federal remedy." *Id.* at 1492. Indeed, the second and third purposes of § 1983 as set forth in *Monroe, supra* require application at least of a flexible exhaustion of state administrative remedies requirement for their fulfillment. 41 U. Chi. L. Rev., *supra* at 553.

This reasoning, however, need not also require the ex-

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[3]In fact, the no-exhaustion rule urged by Petitioner would — in stark disregard of Congressional intent — build into § 1983 an *incentive* to bypass adequate state administrative remedies in order to take further advantage of the liberal attorney's fee provisions of 42 U.S.C. 1988; see, *Maine v. Thiboutot*, 448 U.S. 1, 24 (1980), (Powell, J., dissenting). Indeed, all too often, amici suggest, if the incentive of a no-exhaustion requirement is provided, the choice will be made in favor of attorney's fees, and thus the federal court, and state administrative redress will be virtually foreclosed. Who will pay those attorneys' fees when such plaintiffs "prevail," under the extremely liberal construction of that term applicable in these cases? The very states which were afforded no opportunity to correct any alleged wrong through their administrative processes.

haustion of state *judicial* remedies. The three central purposes of § 1983 set forth in *Monroe* all underline the importance of providing a federal remedy for deprivation of federal rights. To require a § 1983 plaintiff first to attempt to vindicate his rights through the state courts would be to condition access to the federal courts on submission to a lengthy process nearly identical in form to the federal court proceeding. An adequate *administrative* proceeding, on the other hand, offers a method of dispute resolution which courts often cannot match. Administrative decision-makers usually have extensive expertise both in the subject matter of the dispute and in construing their own statutes and regulations. They usually have the ability to generate a detailed factual record. 90 Harv. L. Rev., *supra* at 1265-66. Requiring the exhaustion of adequate administrative remedies thus seems to strike the balance truest both to the intent of Congress that § 1983 not supplant adequate state remedies and the imperative that access to the federal courts not be excessively burdened. In this manner the flexible exhaustion requirement we here urge is most faithful to the purposes of § 1983.[4]

The recent decisions of this Court, contrary to the suggestions of Petitioner and the Amici supporting her position, are not inconsistent with this submission.

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[4]The passage of 42 U.S.C. 1997e is consistent with this Congressional intent. That statute directs a court sitting in a § 1983 case brought by an adult prisoner to continue the matter for no more than 90 days to require the exhaustion of any state administrative remedies certified by the Attorney General or determined by the Court to be in compliance with minimum standards promulgated by the Attorney General. Given the felt need by Congress to ensure the full enforcement of the federal rights of persons in institutions, S. Rep. (Jud. Comm.) No. 90-416, 11-15-79, page 2; 1980 U.S.C.C.A.N. 789, and to *encourage* better administrative grievance resolution systems, *Id.* at 1980 U.S.C.C.A.N. 816, this statute is most properly viewed as a relaxation of existing exhaustion requirements with an incentive to the states to bring their administrative procedures into line with the Attorney General's standards. (The statements of Congressman Butler, to the contrary, cited in Petitioner's Brief at page 52 are simply in error.) To read the statute as instead imposing an exhaustion requirement where one was lacking in the past is to ignore the Congressional intent more fully to protect the federal rights of institutionalized persons and to improve state administrative procedures.

In *Gibson v. Berryhill*, 411 U.S. 564, 574-75 (1973), after stating the inflexible no-exhaustion rule and citing *McNeese* and *Damico*, the Court added:

> "Whether this is invariably the case * * * is a question we need not now decide; for the clear purport of appellees' complaint was that the State Board of Optometry was unconstitutionally constituted and so did not provide them with an adequate administrative remedy requiring exhaustion. Thus, the question of the adequacy of the administrative remedy, *an issue which under federal law the District Court was required to decide*, was for all practical purposes identical with the merits of appellees' lawsuit." (Emphasis supplied)

Significantly, the Court expanded upon this statement by adding:

> "State administrative remedies have been deemed inadequate by federal courts and hence not subject to the exhaustion requirement, on a variety of grounds. Most often this has been because of delay by the agency, Smith v. Illinois Bell Tel. Co., 270 U.S. 587, 46 S.Ct. 408, 70 L.Ed. 747 (1926), or because of some doubt as to whether the agency was empowered to grant effective relief, Union Pac. R. Co. v. Board of Comm'rs of Weld County, 247 U.S. 282, 38 S.Ct. 510, 62 L.Ed. 1110 (1918); McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963). State administrative remedies have also been held inadequate, however, where the state administrative body was found to be biased or to have predetermined the issue before it. Kelly v. Board of Education, 159 F.Supp. 272 (MD Tenn. 1958)." (*Id.* at 575, n. 14.)

With this observation the Court made plain that it did not consider *McNeese* and its descendants as establishing the rigid no-exhaustion rule here urged by petitioners. Indeed, *Berryhill* leaves quite unmistakable the Court's observance of a flexible rule requiring the exhaustion of adequate state administrative remedies. See, *Id.* at 581 (Marshall, J., dissenting).

The Court applied a flexible exhaustion rule again in *Barry v. Barchi*, 443 U.S. 55 (1979). After rejecting the ar-

gument that the Plaintiff there must have exhausted state administrative remedies, the Court stated the rule of decision as follows:

> "Under existing authority, exhaustion of administrative remedies is not required when the question of the adequacy of the administrative remedy * * * [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit." (*Id.* at 63 n. 10, citing *Gibson* at 575).

The four dissenters agreed that "the District Court properly declined * * * to require exhaustion of state remedies that were themselves being challenged as unconstitutional." *Id.* at 68-69 (Brennan, J., dissenting). The dissenters also expressly joined in that part of the majority opinion holding that exhaustion was not necessary in that case, *Id.* at 74, thus putting the weight of a unanimous court behind an apparent use of the flexible exhaustion requirement petitioner would now have the Court reject.

An even more striking fortification of an exhaustion requirement came in *Huffman v. Pursue,* 420 U.S. 592 (1975). A state nuisance judgment against the § 1983 plaintiff had become final and, as the Court apparently was ready to assume, the time for appealing it had run. *Id.* at 608. Even though there was no proceeding, civil or criminal, pending against the plaintiff, the Court applied the *Younger* doctrine and held that he "must exhaust his state appellate remedies before seeking relief in the District Court unless he can bring himself within one of the exceptions specified in *Younger.*" *Id.* at 608. This Court thus found the dictates of federalism so strong, *Id.* at 601, that it required the § 1983 plaintiff, unless he could meet the difficult *Younger* showing, to exhaust state judicial remedies even though there was no action pending against him and even though exhaustion was then impossible, since the time for appeal was assumed to have lapsed. *Id.* at 608.

The Court, in effect, imposed a requirement that a § 1983 plaintiff must have exhausted his state appellate remedies if he wishes to challenge the application against

him of some state law under which a legal proceeding was once pending against him. If considerations of federalism require exhaustion of appellate remedies in a *Huffman* setting, surely they require the much less onerous and much more potentially helpful exhaustion of administrative remedies in cases where the § 1983 plaintiff has not been a defendant in state court. See, Section I, *supra*.

Petitioner, and the Amici supporting her, attach great weight to the most recent of this Court's opinions in this area. See, Petitioner's Brief, page 21; Brief for National Education Association and Lawyer's Committee for Civil Rights Under Law as Amici Curiae, pp. 7 and 8; Brief for the Amicus Curiae National Legal Aid and Defender Association, page 13. Those cases do not, however, provide the mileage which they attempt to squeeze out of them.

In *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Delaware State College v. Ricks*, ___ U.S. ___, 66 L.Ed.2d 431 (1980); and *Chardon v. Fernandez*, 50 U.S.L.W. 3341 (November 2, 1981) the Court held that state statutes of limitations and state tolling rules apply in the context of § 1983 actions. Those holdings were, of course, required by the explicit provisions of 42 U.S.C. § 1988 because such state law, very simply, is not "inconsistent with the constitution and laws of the United States."[5]

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[5]Section 1988, in pertinent part, provides:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statues of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. * * *"

By the same reasoning, however, we submit that in § 1988 Congress also required the application of state law with respect to the exhaustion of administrative remedies, unless such laws, again, are "inconsistent with the constitution and laws of the United States." But, there is nothing whatsoever inconsistent with the constitution and laws of the United States in applying state rules with respect to the exhaustion of administrative remedies in a flexible manner, and no credible suggestion to the contrary has or can be made to this Court. Absent such a showing of inconsistency, made clearly and forcefully, it therefore should be concluded that Congress has likewise required federal court deference to state law in this area, just as in other areas such as the application of state statutes of limitation.

Harmonizing the statute of limitations rules announced in *Tamonio, Ricks,* and *Chardon,* with the flexible exhaustion rule which Amici states here urge is quite simple. Such a rule, we suggest, would provide that if a state, by application of its own law, would require exhaustion of administrative remedies, then such exhaustion is also indeed a precedent to a § 1983 action, — unless the application of both state limitation of actions law and state exhaustion of administrative remedies rules would oust the federal court of jurisdiction and thus preclude an injured party from access to the federal court to seek redress for a federally-protected injury. In that case the responsibility, authority, and jurisdiction of the federal courts to provide the necessary protection for federally-guaranteed rights is paramount and must prevail.

This Court need not now decide, we submit, whether under those circumstances a state statute of limitations, or a state exhaustion of administrative remedies rule, should fall. That decision can, consistent with constitutional doctrine and sound principles of judicial administration, be left to the district courts and courts of appeal to be determined on the basis of the particular facts and circum-

stances presented to them in any individual case.[6] The point simply is this: The federal penetrating intrusion should be required by this Court only where necessary to pierce a state law wall existing between an aggrieved individual and the door to the federal courthouse. Where such penetration is not absolutely necessary, sound principles of comity, federalism, and wise judicial administration militate strongly in favor of deference to state law and the application of a flexible exhaustion of administrative remedies rule, where those remedies are available, adequate, and would not work automatically to deny any potential plaintiff access to the federal court.

Petitioner, and her supporting Amici, also place great store in this Court's most recent decision in *Fair Assessment In Real Estate Association, Inc. v. McNary*, 50 U.S.L.W. 4017 (December 1, 1981). The analysis and reasoning employed in the *Fair* case should, however, we submit, support the application of a flexible exhaustion rule which would not under all circumstances result in a complete bar to federal court jurisdiction under 42 U.S.C. 1983. The principles of comity and sound judicial administration embodied in the majority opinion are not unique in their application to actions involving the assessment and collection of state taxes, and should not be cavalierly rejected in the context of other § 1983 actions, as Petitioner's and her supporting amici would have this Court do.

The four concurring justices in *Fair*, while not willing to accede to an absolute bar to § 1983 actions under the circumstances, did recognize, at least in the area of state

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[6]In some cases the denial of civil rights is alleged entirely independent of the administrative process. In others, it is, and will continue to be, alleged that the administrative process itself somehow infringed upon federally-protected rights, or that rights were denied by or during the review granted, because of faulty procedures, lack of due process, bias, etc. Given adequate flexibility and guidance, the district courts and courts of appeal are perfectly capable of determining which state rule should be overridden, if any, under the particular circumstances, subject always to this Court's supervisory appellate jurisdiction.

taxation, a necessity for the ability of states to permit their well-established administrative processes to run their course. While prefacing his remarks with a restatement of what he perceives to be an absolute no exhaustion rule, Justice Brennan also recognized that such a conclusion "rests firmly on the understanding that such was the intention of Congress in enacting § 1983." (50 U.S.L.W. 4027, Brennan, J., concurring) We, of course, here submit that Congress, in enacting § 1988, also intended, indeed directed, that state administrative remedies be exhausted, where appropriate, and where they would not act to preclude federal court jurisdiction. See, page 16, *supra*. As Justice Brennan went on to say:

> "My view has always been that displacement of section 1983 remedies, can only 'be justified by a clear statement of Congressional intent, or, at the very least, by the presence of the most persuasive considerations of policy.' Surely a somewhat lesser showing is required where, as here, we are concerned not with the displacement of the section 1983 remedy, but with the deferral of federal court consideration pending exhaustion of the state administrative process. Where the obligation to require exhaustion of administrative remedies may be fairly understood from Congressional action, *or is in accord with Congressional policy*, not only is section 1983 no bar, but the federal court should be alert to further those policies." (footnote omitted, citation omitted) (Emphasis supplied) (50 U.S.L.W. 4027, Brennan, J., concurring)

It is essential to keep in mind that virtually all § 1983 actions seek damages because of the actions or behavior of individual state or local officials, acting in their official capacities. In many, if not most, of these cases some or all of the named defendants have had only a passive involvement in the action complained of. They are, for example, agency directors, governors, or other executive or administrative officers having supervisory authority over someone who has made a decision which is alleged to constitute a denial of some individual's civil rights. In many of these cases, the first time the Governor of a state, or a

state agency director even hears of the problem is when a complaint is served upon them. It is simply not fair to require these individuals, under those circumstances, to respond in damages for doing something wrong when they have not even been given the opportunity to do something in the first place. That something, of course, is most often provided to them through access, by the complaining individual, to available and appropriate state administrative processes.

Likewise, this Court cannot ignore the fact, the legal reality and the political and governmental necessity, that states, as well as municipalities, are directly involved in these actions. The damages, if any, are to be paid from governmental treasuries as a matter of state and local law.[7] This Court should not any longer be caught up in the traditional fiction that because states are immune from suit in this area, only individuals are being sued and thus are to pay the damages, and that state funds are not involved. To continue that fiction in this context is, irresponsibly, to ignore reality. Because the states' treasuries are being placed at risk, the states should be allowed the opportunity to repair, through their administrative processes, any damage occasioned by the actions of an individual — before the public treasury is required by a federal court, a different and higher governmental body, to pay damages which may have been avoided or repaired if their full governmental and administrative process had been allowed to run its course. Principles of comity, federalism, sound judicial administration, basic fairness and common sense demand no less. Again, as Justice Brennan also said in *Fair, supra,*

> "* * * Many of the officials named as defendants have no small involvement in the administrative process. It surely seems appropriate that before being held accountable in court those officials have the opportunity fully to consider petitioners' claims within the administrative forum that provides the only basis

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[7]See, e.g., Chap. 4.92 Rev. Code Wash., particularly RCW 4.92.060, 070, 170.

for their involvement in this matter. * * *" (citation omitted) (50 U.S.L.W. 4027, note 24, Brennan, J., concurring)

IV. Until Petitioner Here Exhausts State Administrative Remedies, She Has Not Been Deprived of Any Right Under Color of State Law.

The § 1983 defendant in this case is a "body corporate" and an arm of the state Department of Education. Fla. Stat. 240.205 and § 20.15 (West 1977). The Petitioner does not contend that any individual employees or officials of the defendant deprived her of any right. Rather, she insists that it was the defendant body itself which deprived her of these rights.

It is the official and express policy of the defendant that it will not discriminate on the basis of race or sex in its employment practices, *Patsy, supra* at 913. The initial determination as to whether a job applicant will be hired involves decision-making on several different levels in the University structure. See, Fla. Ad. Code § 6C8-4.19(4) and (5) (1981). In part as a method of ensuring that discrimination on the basis of race or sex will not creep into the initial hiring decisions, see *Patsy, supra* at 913, there was established within the University itself a comprehensive procedure for appeal from initial employment decisions. *Id.* at 913. The University obviously takes its nondiscrimination policy seriously and, through its grievance procedure, has gone to great lengths to effectuate that policy. The initial hiring decision and the grievance procedure are parts of a coherent, unified process aimed at ensuring that the University hiring decisions are not discriminatory.

After going through virtually none of this process, Petitioner now claims that a hiring decision by the defendant discriminated against her. Petitioner claims that she can ignore fully all of the procedures afforded her by defendant to protect her against inadvertent discriminaiton and still contend that the defendant body *itself* deprived her of a right not to be discriminated

against. Fortunately, such a claim is not cognizable under § 1983.

For, as this Court observed in *Monell v. Department of Social and Health Services*, 436 U.S. 658, 690 (1978),

> "* * * the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights * * *"

The *Monell* Court, *supra* at 690-91, also recognized that deprivations pursuant to governmental "custom," although lacking formal, official approval, are also cognizable under § 1983. The actions of the University in this case fail on both counts to rise to the level of § 1983 deprivations. The official policy of the University prohibits discrimination, and the comprehensive grievance procedure designed to effectuate that policy indicate that employment discrimination would be anything but customary. The requirement that a govermental body be responsible through plan, policy or custom for a deprivation of rights before it may be held liable for that deprivation is one born of simple notion of fairness. The requirement is not met by the failure of the initial selection process of defendant to give Petitioner the employment she wanted.

V. Petitioner's Claim Under § 1983 Is Not Ripe For Adjudication.

Although collateral in nature, Petitioner's resort to federal court was an attempt to invoke federal judicial review of a *tentative* state administrative decision. To prevent courts from entangling themselves in abstract disagreements over administrative policy and to protect agencies from judicial interference until the administrative decision is finalized, this Court has developed the "ripeness" limitation on judicial review of administrative decisions. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). Under this doctrine, a court is to consider the fitness of the issues for judicial determination and the hardship to the parties in delaying court consideration in

determining whether an issue is ready for judicial resolution. *Id.* at 149. Since the risks of entanglement and interference to which the ripeness doctrine is addressed are present, if anything, to a greater degree in a federal court challenge (under § 1983) to a not yet final state administrative determination, the ripeness doctrine should be applied in these cases as well. Under that doctrine, recent cases make clear, Petitioner's claim is simply not ripe.

In *Federal Trade Commission v. Standard Oil of California*, ___ U.S. ___, 66 L.Ed.2d 416 (1980) the Court concluded that a challenge to the initiation of an F.T.C. administrative proceeding was not ripe for review, even though the initiation of the proceeding itself was alleged to be unlawful. Although the administrative action challenged here admittedly had progressed beyond the point of initiation of a proceeding, the considerations which led this Court to remand for dismissal on ripeness grounds in the F.T.C. case speak strongly for a similar result here. The Court observed that the administrative complaint before the F.T.C. was not a definitive statement of position. *Id.* at 425. Any discrimination suffered by Petitioner below likewise could not have been the result of a "definitive statement of position" by defendant, since defendant had a strong policy not to discriminate. The Court noted that the initial administrative decision could be appealed within the F.T.C. *Id.* at 425. The acts complained of by Petitioner also could be appealed within the agency. The Court noted that the burden on defendant caused by delaying adjudication was merely having to respond to the administrative complaint. *Id.* at 425-26. Similarly, the only "burden" on Petitioner here, should exhaustion be required, would be going through the administrative process. Finally, the Court found that immediate adjudication would interfere with the proper functioning of the agency in that it would deny the agency the opportunity to correct its own mistakes and to apply its expertise to the dispute, and would lead to piecemeal review. *Id.* at 426. Each of these risks would be present be-

low if Petitioner is allowed to circumvent administrative procedures. Since the very dangers the ripeness doctrine guards against would be present should Petitioner be allowed to bypass administrative remedies, it follows that her claim is not ripe for review until she exhausts those remedies.

The question of ripeness does not arise only in the context of review of administrative decision. In *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59 (1978), this Court decided that the constitutionality of a Congressional limitation of liability for nuclear accidents was ripe for adjudication. In discussing the prudential considerations inherent in the doctrine, the Court noted that a delay in adjudication would not aid the Court in resolving the issue, that it would foreclose relief and that a delay would frustrate Congressional intent.

Requiring exhaustion here, and in similar future circumstances, will, however, have exactly the opposite effect. A delay in Petitioner's § 1983 suit for exhaustion purposes would aid the District Court in resolving the issues because it would sharpen those issues, provide a golden opportunity for informal settlement, allow defendant to exercise its full procedures for the purpose of effectuating its non-discrimination policy, and generate a detailed record, an important feature in constitutional adjudication. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 146 (1974). A delay for exhaustion purposes also would not foreclose any relief, see page 6, *supra* and would tend to *serve* the purposes of § 1983. See, pages 10-12, *supra*. The tests used in *Duke Power* indicate that the Court will be in a "better position later," *Duke Power, supra* at 82, to resolve this dispute. With that, the ripeness doctrine counsels that Petitioner and others like her be required to exhaust her administrative remedies, where they are available, and adequate, and this application would not time bar federal court jurisdiction.

CONCLUSION

The exhaustion issue thus presents one of the less perplexing parts of the riddle of how to ensure the vigorous protection of federal rights without upsetting the essential equilibrium between the national and state governments. A flexible exhaustion requirement of the type adopted below will serve well our federalism and, if anything, will facilitate the vindication of federal rights. An unyielding no-exhaustion requirement, on the other hand, will unduly tax those balances, without significantly promoting the vindication of federal rights.

Respectfully submitted,

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